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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HECTOR N. DIAZ et al., Plaintiffs and Appellants, v. REAL ESTATE COMMISSIONER OF THE STATE OF CALIFORNIA et al., Defendants and Respondents.	B249868 (Los Angeles County Super. Ct. No. BS137690)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Law Offices of Frank M. Buda and Frank M. Buda for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Paul D. Gifford, Assistant Attorney General, Diane S. Shaw and Elisa B. Wolfe-Donato, Deputy Attorneys General, for Defendants and Respondents.

Hector N. Diaz (Diaz) and The Diaz Group, Inc. (DGI) appeal from the judgment denying their petition for a writ of mandate compelling the Real Estate Commissioner of the State of California (Commissioner) to set aside its decision, inter alia, revoking their broker licenses.[1] We find no error and affirm.

FACTS

Diaz and DGI

Diaz obtained his real estate broker license from the Department on June 7, 2005. At the same time, he obtained permission to do business as Supremacy Realtors and Object Mortgage. Thereafter, DGI obtained a license in early 2006, and Diaz was listed as its designated officer.

Marco Antonio Munoz (*Munoz*)

The Department issued Munoz a conditional real estate salesperson license in 2005. Beginning in June 2008, he became a licensed agent under Diaz's broker license pursuant to an independent contractor agreement. The agreement provided that Munoz would pay DGI "$500 per transaction on Real Estate and Mortgage Loans." Initially, he worked at an office located at 1020 South Anaheim Boulevard, Suite 310, in Anaheim. Diaz and DGI obtained branch licenses for the office where Munoz worked.

American National Group

American National Group (ANG) was located at 1701 East Lincoln Avenue in Anaheim. It advertised itself as a company that helped borrowers avoid foreclosure. Among other things, it negotiated loan modifications. The Department never issued a license to ANG. Cavaldi Management, Inc. was the registered owner, and Cesar Valdivia (Valdivia), Munoz's first cousin, was listed as ANG's "Officer/Director." Though Valdivia had a real estate salesperson license, he did not have a broker license. Eddy Faijo (Faijo), Jaime Amayo (Amayo) and Maria Delgado Nieto (Nieto) all worked at ANG. They were not licensed by the Department.

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[1] The respondents are the Commissioner and the Department of Real Estate of the State of California (Department).

Munoz's Move to ANG's Office

Valdivia decided Munoz should work at ANG's office. He did so, beginning in August 2008. DGI obtained a branch license for the new office on November 5, 2008. Four months later, on March 10, 2009, Diaz obtained a corresponding branch license.

Munoz's e-mail address was mmunoz@anghelp.com.

In February to April 2009, Munoz processed loan modifications and helped people buy and sell homes for ANG.

The Flores Listing

Valdivia asked Munoz to help a person named Jose R. Flores (Flores) do a short sale on a house for $350,000. Flores owed $388,000 on a first mortgage and $97,000 on a second mortgage. In October 2008, Munoz and Flores entered into a residential listing agreement in which Supremacy Realtors was listed as Flores's broker. Flores lost interest and the house never sold.

The Pineda Transaction

Munoz arranged a loan for a borrower named Pineda in connection with the purchase of a single family residence. DGI received a commission, and then Diaz paid Munoz his commission from those proceeds. The file was either lost or "ruined" when Munoz moved his office.

Diaz's Supervision of Munoz

Diaz reviewed two listing agreements that Munoz entered into on behalf of DGI. Munoz was responsible for keeping his files, and Diaz was supposed to pick them up. They met five or six times, and Munoz reported that "he had no activity going on." Whenever Diaz went to ANG's office, it was for about 10 to 20 minutes. A couple of times, Diaz spoke to Valdivia. They did not speak about the specifics of their businesses, except that Valvidia said that he was doing loan modifications through a law firm.

Consumer Complaints About ANG; Initial Investigation

Consumers complained to the Department about ANG's collection of advance fees. The Department assigned Samuel Delgado (Delgado) to investigate Diaz, DGI, Valdivia and Munoz.

The Loan Modification Addendum

In April 2009, the Department authorized DGI to perform loan modifications. Soon after, Munoz expressed interest in loan modification work. On June 23, 2009, Munoz changed his employing broker to Castleview Direct. When later asked about that, he said the change was done by a bank representative so Munoz could get a commission on an FHA loan.

DGI and Munoz entered into a July 2009 addendum to the independent contractor agreement. The addendum provided: "Agent . . . Munoz agrees to pay [DGI] the amount of $300 for each loan modification he performs. This amount is payable from the advance fee collected from his customers." At the time, Diaz was not aware that Munoz had changed brokers.

The July 22, 2009, Letter from DGI to the Department

The Department sent Diaz a letter indicating that it was inquiring into ANG's loan modification services. According to the Department, Diaz had previously confirmed that he had a business arrangement with ANG and Munoz to conduct loan modifications. It requested a "written chronological version of the subject matter in order that we may consider all pertinent facts in our inquiry" as well as "copies of all of the documents relating to this transaction [*sic*], including but not limited to 1) [the Department's] 'No objection letter' \ . . . [,] 2) employee records for [Munoz][, and] 3) [the] business contract between [ANG]/[Munoz] and [DGI]."

On behalf of DGI, Diaz wrote a letter to the Department denying affiliation with ANG and stating, in part: "In June of 2008, . . . Munoz asked me if he could work with our company as a Real Estate Agent and since then he has not close[d] any transactions with our company."

Delgado's July 30, 2009, Visit to ANG

Delgado went to ANG's office on July 30, 2009. It had advertising for ANG facing traffic. He asked two men near the entrance if they would help him with a loan modification, and they said yes. Delgado said he was with the Department and asked to speak to the real estate broker. Eventually, Munoz appeared. When Delgado asked about

ANG's unlicensed loan modification activity, Munoz said "they" were authorized to perform loan modifications under DGI, who was the real estate broker. According to Munoz, Diaz had filed ANG's office as a branch office and had contracted ANG to do loan modifications under DGI's no objection letter from the Department. Delgado asked for copies of recent loan modification files performed under DGI's no objection letter, and Munoz said all the files had been forwarded to "their" attorney.

The Accusation

The Department filed an Accusation against Diaz and DGI that contained two causes. In the First Cause, which was labeled "Unlicensed DBA/Unlicensed Activity," the Department alleged that the term "Respondents" referred to Diaz, DGI, ANG, Munoz, Valdivia, Faijo, Amayo and Nieto. It was then alleged that the Respondents used the fictitious business name ANG to collect advance fees from borrowers and provide loan modification and negotiation services "requiring the issuance of a real estate broker license" despite not "filing an application for the use of such name with the Department" as required by statute and regulation. Also through the ANG business name, the Respondents "utilized employees and/or representatives in soliciting and negotiating loans [even though they] were not licensed by the Department as real estate brokers or salespersons." In part, it was alleged that the Respondents solicited and entered into contracts for loan modification and negotiation services with Patricia Cisneros, Rogelio Gomez, Jorge Montes, Pedro Perez, Gloria Cruz, Fidel Moreno, Maria Candelaria Muratalla, and Luis Alarcon, and that the Respondents charged an advance fee. Other borrowers who paid an advance fee were identified as Cecilio Lara, Magaly Granados, Hector Rocha, Juan Carlos Luevano, Leticia Medina and Pedro Carillo.

With respect to Munoz, the Accusation alleged that DGI was listed as his employing broker from June 20, 2008, through June 29, 2009, and that Munoz "engaged in activities requiring a real estate transaction for Diaz' dba Supremacy Realtors in 2008 and 2009." From April 2008 to May 18, 2009, Munoz "advertised short sale and loan modification services under one or more business names including, but not limited to, 'ANG' in various print and electronic media, including a website located at

http://www.anghelp.com. Those advertisements solicited borrowers [by] offering short sales and loan modification services and listed" an address for ANG that was the same for DGI's Anaheim branch location. Along with other respondents, Munoz did the following: "negotiate the purchase, sale or exchange of real property; negotiate one or more loans for, or perform services for, borrowers and/or lenders in connection with loans secured directly or collaterally by one or more liens on real property; and charge, demand or collect an advance fee[.]"

The Second Cause of the Accusation incorporated all prior allegations and then alleged the following: "Respondent Diaz's failure to supervise the activities of Respondent DGI to ensure compliance with the Real Estate Law is in violation of [section] 10159.2 and [s]ection 2725, subdivision (a) of Title 10, Chapter 6, California Code of Regulations, and constitutes additional grounds to suspend or revoke Respondent Diaz'[s] license and [or] license rights[.]"

Administrative Proceedings

The Department held a hearing.

Administrative Law Judge Mark Harman (ALJ Harman) issued a proposed decision stating that the Department failed to prove that Diaz or DGI caused ANG or its employees to perform loan modification services or advance fees transactions. Nor did the Department prove that Diaz or DGI profited from those transactions, and that they were aware that Munoz was violating the law. However, ALJ Harman found cause for discipline under Business and Professions Code section 10177, subdivisions (d), (g) and (h)[2] for the failure of Diaz and DGI to exercise reasonable supervision over Munoz while he worked at DGI's branch office, which was ANG's office.

According to ALJ Harman, Munoz and Valdivia "were offering loan modification services as [ANG]." Munoz kept business cards showing him as a "Loan Officer/Realtor" for ANG.

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[2] All further statutory references are to the Business and Professions Code unless otherwise indicated.

In paragraph 5 of his legal conclusions, ALJ Harman determined that "Munoz was engaged in real estate activities, e.g., loan modification services, that required a license, but he was acting in the name of ANG instead of the name of his broker, Respondent [DGI], which was the only broker that was authorized to employ and compensate him." ALJ Harman noted that section 10159.5 requires a person applying for a license to file a copy of his fictitious business name statement, and that title 10, section 2731(a) of the California Code of Regulations makes it unlawful for a licensee to conduct business under a fictitious business name unless that fictitious business name is on the license.

In paragraphs 7 and 8 of his legal conclusions, ALJ Harman cited section 10159.2, subdivision (a) and then determined that Diaz and DGI "failed to maintain records of transactions that Munoz had performed. [Diaz] was unaware of the Flores short sale transaction. Respondent Diaz failed to implement policies and procedures that would enable him to supervise Munoz in the performance of real estate activities within ANG's office."

ALJ Harman noted: "Respondent Diaz had knowledge that Valdivia and ANG were performing loan modification services, but somehow, he did not know the legal requirements to engage in this activity. Respondent Diaz, nevertheless, designated ANG's office as a licensed branch office and employed Valdivia's cousin, Munoz, as his agent while working inside ANG's office. These acts enhanced ANG's interests by giving the appearances to customers that ANG was operating a legitimate real estate business at [the Lincoln Avenue] location."

While the evidence did not explain the parties' expectations, ALJ Harman inferred that "Respondent Diaz chose, as a business decision, not to find out what was going on at ANG so that he would be able to claim that he was not aware of nor connected with ANG's violations of the Real Estate Law. Respondent Diaz may argue that he simply relied on Munoz to initiate a discussion about Munoz's real estate activities, but that in no way satisfies Respondent Diaz's duty to supervise his employee." According to ALJ Harman, Diaz's "denial of any wrongdoing suggests that he is not amenable to correction at the present time."

ALJ Harman proposed an order that would provide, inter alia: All Diaz's and DGI's licenses under the Real Estate Law are revoked. Within 90 days, Diaz can apply for a restricted real estate salesperson license. After four years, he can apply for an unrestricted real estate salesperson license.

The Commissioner adopted the proposed decision.

The Petition for Writ of Mandate

Diaz and DGI filed a petition for a writ of mandate compelling the Commissioner to set aside his decision. Because their case involved a vested, fundamental right, the trial court exercised its independent judgment on the evidence set forth in the administrative record.

According to the trial court: (1) the weight of the evidence supports the Commissioner's finding that Diaz and DGI failed to exercise reasonable supervision of Munoz; (2) the July 22, 2009, letter from Diaz to the Department demonstrated that he was unaware of the Pineda transaction and therefore failed to keep track of Munoz's transactions; (3) though Diaz met with Munoz five or six times at ANG's office, Diaz merely accepted Munoz's word when he said he had "no activity going on" and failed to inquire how Munoz was spending his time, or about what specific activities he was engaged in; (4) Diaz and DGI's failure to inquire further into Munoz's work and progress amounted to a willful blindness and was not reasonable; (5) Diaz and DGI failed to reasonably supervise Munoz because he operated, to some degree, at the discretion of Valdivia, the owner of ANG and a person not affiliated with Diaz and DGI; (6) it was incumbent upon Diaz and DGI to ensure that Munoz's actions were not being directed to any degree by ANG or Valdivia; (7) Diaz and DGI failed to establish sufficient policies, rules, procedures and systems to review, oversee, inspect and manage Munoz at ANG's office; (8) Munoz engaged in multiple transactions without the knowledge of Diaz and DGI, including the Flores listing and, as stated by ANG employee Gudilia Granados (Granados), Munoz processed loan modifications and acted as a realtor by helping people buy and sell homes; (9) even though Munoz did not reveal his activities to Diaz, that does not absolve him of the responsibility to further inquire into Munoz's activities; (10) the

evidence showed that Munoz was Diaz and DGI's licensee and was supposed to act on their behalf only; and (11) Diaz and DGI failed to provide files to the Department regarding Munoz's transactions.

The petition was denied.

This timely appeal followed.

STANDARD OF REVIEW

When a trial court reviews a decision by the Commissioner to revoke the license of a real estate broker or salesperson, it "must exercise its independent judgment on the evidence underlying that decision and determine whether the Commissioner's findings are supported by the weight of the evidence. [Citations.] The reviewing court then must determine whether the trial court's factual findings concerning the truth of the accusations or alleged violations are supported by substantial evidence. [Citations.]" (*California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575, 1580.) "A different rule applies when the issue is the nature of the penalty imposed. A court will not disturb the decision of the Commissioner on the penalty unless the licensee demonstrates an abuse of discretion. Neither a trial court nor an appellate court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed. [Citations.]" (*Ibid.*)

Regardless of the foregoing, """the trial court's legal conclusions are open to our examination to determine if errors of law were committed." [Citation.]'" (*Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786, 796.) It is well-established that questions of law are subject to de novo review. (*Ocean Avenue LLC v. County of Los Angeles* (2014) 227 Cal.App.4th 344, 349.)

DISCUSSION

I. The Meaning of Section 10159.2.

According to Diaz and DGI, the trial court misconstrued section 10159.2 by reading it to encompass all of Munoz's activities for which a license was required rather than only those performed on their behalf.

We consult the rules of statutory construction to determine whether the scope of section 10159.2 is as narrow as Diaz and DGI advocate. "'The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] "In determining intent, we look first to the language of the statute, giving effect to its 'plain meaning.'" [Citation.] "'If the language is unambiguous, our task is finished. [Citations.] If the language is ambiguous, we then examine the context of the statute, striving to harmonize the provision internally and with related statutes, and we may also consult extrinsic indicia of intent as contained in the legislative history of the statute." [Citation.]' [Citation.]" (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 517.)

If the statute does not have a plain meaning and legislative history sheds no light, then a court must "'apply reason, practicality, and common sense to the language at hand.' [Citation.]" (*U.D. Registry, Inc. v. Municipal Court* (1996) 50 Cal.App.4th 671, 674.) Consideration should be given to the consequences that will flow from a particular interpretation. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.) As a corollary, a court will not give a statute's language a literal meaning """if doing so would result in absurd consequences which the Legislature did not intend." [Citations.] . . . Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."'" (*People v. Townsend* (1998) 62 Cal.App.4th 1390, 1395.)

Finally, we note that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.)

Now we turn to the statute.

Section 10159.2, subdivision (a) provides: "The officer designated by a corporate broker licensee pursuant to Section 10211 shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division,

including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required."

This language brooks no compromise. For any real estate salesperson employed by a broker, the statute covers all activities of that real estate salesperson for which a license is required.

Even if the statute was ambiguous, we would construe it broadly.

We note that a real estate broker, inter alia, is a person who negotiates or solicits transactions involving and related to the sale, purchase, lease or exchange of real property, or related to loans secured by liens on real property. (§ 10131.) And "[a] real estate salesman within the meaning of this part is a natural person who, for a compensation or in expectation of a compensation, is employed by a licensed real estate broker to do one or more of the acts set forth in Sections 10131, 10131.1, 10131.2, 10131.3, 10131.4, and 10131.6." (§ 10132.) The statutory scheme contemplates that real estate salespersons will engage in real estate transactions only under a broker. As one case explained, "[I]t is evident that brokers and salesmen belong in distinctly different categories and that the broker, because of his superior knowledge, experience and proven stability is authorized to deal with the public, contract with its members and collect money from them; the salesman, on the other hand, is strictly the agent of the broker. He cannot contract in his own name [citations], nor accept compensation from any person other than the broker under whom he is licensed; it is a misdemeanor for anyone, whether obligor, escrow holder, or otherwise, to pay or deliver to anyone other than the broker compensation for services within the scope of the act. [Citation.]" (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 406; *Venturi & Co. LLC v. Pacific Malibu Development Corp*. (2009) 172 Cal.App.4th 1417, 1424, fn. 8; § 10138.)

The only way for that real estate salesperson to be properly supervised, and the best way to ensure that the public is protected, is to construe section 10159.2, subdivision (a) as covering all real estate salespersons' activities. If the statute were construed narrowly, real estate salespersons employed by a broker could engage in unsupervised activity for which a license was required by the simple artifice of saying the activity was

not on the broker's behalf. This consequence would be untenable because, "with no such fixed responsibility, the statutory purpose would be frustrated." (*Norman v. Department of Real Estate* (1979) 93 Cal.App.3d. 768, 776–777.)

II. Procedural Due Process.

Diaz contends that the Department's decision violated procedural due process because it was based on factual matters not alleged in the Second Cause of the Accusation. We disagree.

A. Pleading requirements.

Proceedings to suspend or revoke a real estate license are subject to chapter 5 of title 2, division 3, part 1 of the Government Code, which regulates administrative adjudications. (§ 10100; *Manning v. Watson* (1952) 108 Cal.App.2d 705, 710.) Government Code section 11503 provides: "A hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned shall be initiated by filing an accusation. . . . The accusation . . . shall be a written statement of charges . . . that shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his or her defense. It shall specify the statutes and rules . . . that the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of . . . those statutes and rules."

Precedent softens the rule by providing that administrative proceedings "'are not bound by strict rules of pleading. . . . So long as the respondent is informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process, he cannot complain of a variance between adminsitrative pleadings and proof.'" (*Smith v. State Bd. of Pharmacy* (1995) 37 Cal.App.4th 229, 241 (*Smith*).) Thus, when an accused challenges disciplinary action based on an agency's failure to comply with the dictates of Government Code section 11503, courts "'are more interested with fair notice to the accused than they are to adherence to the technical rules of pleading.'" (*Rolfe v. Munro* (1958) 165 Cal.App.2d 726, 730.) "The first consideration under that statute

should be whether or not the respondent was in fact able to prepare his defense after reading the accusation." (*Id*. at p. 730.)

B. Issues identified by the Second Cause.

Based on incorporated allegations, the Second Cause alleged that Munoz advertised short sale and loan modification services under one or more business names, including ANG; he negotiated the purchase, sale or exchange of real property; he negotiated loans; and he "engaged in activities requiring a real estate transaction for [Diaz'] dba Supremacy Realtors in 2008 and 2009." It was also alleged that DGI was Munoz's employing broker. Then, the Second Cause alleged that Diaz failed to supervise DGI's activities. Taken together, the allegations accused Diaz of failing to supervise Munoz's advertising, negotiation of real estate sales and loans, and activities requiring a real estate transaction. Moreover, the Second Cause alleged that Diaz violated section 10159.2.

Additionally, the Department alleged that Diaz violated section 2725 of title 10 of the California Code of Regulations. In part, it provides: "A broker shall exercise reasonable supervision over the activities of his or her salespersons. Reasonable supervision includes, as appropriate, the establishment of policies, rules, procedures and systems to review, oversee, inspect and manage: [¶] (a) Transactions requiring a real estate license. [¶] (b) Documents which may have a material effect upon the rights or obligations of a party to the transaction. [¶] (c) Filing, storage and maintenance of such documents. [¶] (d) The handling of trust funds. [¶] (e) Advertising of any service for which a license is required. [¶] (f) Familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination. [¶] (g) Regular and consistent reports of licensed activities of salespersons." (Cal. Code Regs., tit. 10, § 2725.)

C. The basis for discipline.

The Commissioner found: (1) Munoz acted in ANG's name and engaged in loan modification services that required a license; (2) Diaz and DGI failed to maintain records of Munoz's transactions; and (3) Diaz and DGI failed to implement policies and

procedures to enable Diaz to supervise Munoz. Though not worded exactly the same, the trial court made the same findings. In addition, the trial court found that Munoz acted as a realtor for ANG.

D. Diaz and DGI had adequate notice.

Because it was alleged that DGI was Munoz's broker, it was sufficiently alleged that all of Munoz's activities requiring a license fell under DGI's broker license and were therefore pursued on behalf of DGI. And the Second Cause identified the statute and regulations that Diaz violated. Given the allegations in the Accusation, we conclude that Diaz and DGI were given sufficient notice that they would have to defend against the contention that they did not properly supervise Munoz in connection with loan modifications as well as the negotiation of real estate sales, purchases and exchanges, all of which required a license, and that the alleged failure to supervise could be of any particular variety proscribed by law such as the failure to maintain records or develop policies and procedures to supervise salespersons. Though the Accusation did not specifically refer to Diaz and DGI's failure to supervise with respect to the Pineda transaction and the Flores listing, that is of no moment. Those specific violations are simply examples of the generally alleged failure to supervise Munoz in connection with real estate transactions.

To demonstrate that they were not given proper notice of the allegations against them, Diaz and DGI try to analogize to *Smith*.

In *Smith*, a man named Stoner died after ingesting drugs. In his hotel room, the authorities found multiple prescription bottles, seven of which came from Parkway Pharmacy. The pharmacist-in-charge, a man named Smith, was accused of personally dispensing the drugs in an accusation filed by the State Board of Pharmacy. At the administrative hearing, the evidence revealed that the pharmacy's owner, Roth, had been dispensing drugs to Stoner. Because the Board was unable to prove that Smith personally dispensed the drugs, it suggested in closing argument that Smith had been negligent because he did not ensure that the pharmacy complied with the law. The administrative law judge upheld, inter alia, a charge of clearly excessive furnishing of controlled

substances. (*Smith, supra*, 37 Cal.App.4th at pp. 232, 237–242.) The court found that Smith had been deprived of procedural due process because "he was misled by the accusation and the prehearing conference statement into believing he needed to prepare a defense to the personal dispensing charges." (*Id*. at p. 242.)

Any analogy to *Smith* fails. There, the accusation was not premised on the theory that ultimately prevailed at the administrative hearing. Here, in contrast, the Accusation alleged failure to supervise, the very charge that was sustained by ALJ Harman, adopted by the Commissioner, and confirmed by the trial court.

III. Consistency of the Trial Court's Ruling.

One major complaint in Diaz and DGI's briefs is best phrased as a question: How could the Second Cause be sustained if it was based on the same allegations that were unfounded in the First Cause?

As we explain, this question has a faulty premise.

The First Cause alleged that Diaz and Munoz intentionally used ANG to engage in real estate activity that could not be performed lawfully unless it was done under and in the name of a licensed broker. While the trial court concluded that there was no issue as to the First Cause because ALJ Harman found that Diaz did not cause ANG or its employees to perform loan modification services or advance fee transactions, the trial court essentially upheld the allegation that Munoz engaged in loan modification services and acted as a realtor through ANG. In other words, the trial court found the allegations in the First Cause, which were incorporated by reference into the Second Cause, to be true as to Munoz. This means that Diaz and DGI are incorrect when they suggest that all allegations in the First Cause were unfounded.

Given its findings as to Munoz, the trial court then concluded that even though Diaz was not aware of and did not direct Munoz's activities, Diaz was negligent or willfully blind in his failure to supervise Munoz. In this light, there is nothing inconsistent about the trial court's ruling because the Accusation as a whole was based, in part, on the activities of Munoz, and it offered alternative grounds for revoking the

licenses of Diaz and DGI, i.e., either Diaz directed Munoz's activities or failed to properly supervise him.

IV. Availability of Disciplinary Action.

Diaz and DGI argue that they cannot be disciplined because they lacked guilty knowledge of Munoz's violations of the law.

This argument is unfounded.

Their appellate parry springs from section 10179. It provides: "No violation of any of the provisions of this part relating to real estate or of Chapter 1 of Part 2 by any real estate salesman or employee of any licensed real estate broker shall cause the revocation or suspension of the license of the employer of the salesman or employee unless it appears upon a hearing by the commissioner that the employer had guilty knowledge of such violation." (§ 10179.)

On its face, this statute has no application to this case. Diaz and DGI were disciplined because of Diaz's failure to supervise Munoz. Contrary to what Diaz and DGI would have us believe, they were not disciplined based on vicarious liability for violations committed by Munoz.

V. The Commissioner's Factual Findings.

Diaz and DGI contend that the Commissioner abused his discretion in the factual findings by: improperly punishing Diaz for allowing Munoz to act for ANG; proceeding in excess of jurisdiction by holding Diaz and DGI responsible for activities performed by Munoz even though he was not acting under their broker licenses; ruling against Diaz and DGI even though the weight of the evidence did not establish what licensed activities Munoz performed on their behalf, or how Diaz failed to supervise Munoz for those activities; and finding that Munoz's independent contractor agreement allowed him to do loan modifications.

Next, Diaz and DGI contend that the Commissioner abused his discretion in his legal conclusions by finding that they violated the law with respect to activities performed by Munoz on behalf of ANG, and by finding that Diaz and DGI failed to exercise reasonable supervision of Munoz.

These contentions are moot. Because we are called upon by the standard of review to examine the trial court's independent factual findings, we decline Diaz and DGI's invitation to examine the Commissioner's factual findings. Even if their argument could be construed as an attack on the trial court's similar factual findings, the attack fails because they did not apply the substantial evidence test. (*People v. Foss* (2007) 155 Cal.App.4th 113, 126 ["When an appellant fails to apply the appropriate standard of review, the argument lacks legal force"].)

VI. Sufficiency of the Trial Court's Review.

Diaz and DGI argue that the trial court failed to exercise independent review of the evidence adduced at the administrative hearing. We cannot concur. In the trial court's ruling, it indicated that it exercised independent judgment. Diaz and DGI have not shown that the trial court eschewed that standard.

Though their presentation is convoluted, we glean from Diaz and DGI's briefs their further notion that the trial court improperly applied a preponderance of the evidence standard of proof. It is true, as they suggest, that under "the California Constitution, the suspension or revocation of a professional license must be based on misconduct proven by clear and convincing evidence. [Citation.]" (*The Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1502.) However, the clerk's transcript and reporter's transcript do not suggest that the trial court misperceived its obligation when assessing the evidence.

VII. Accuracy of the Trial Court's Factual Findings.

In their final attack on the trial court's ruling on the violations, Diaz and DGI contend that the trial court made three factual errors. They do not contend that there was insufficient evidence to support the trial court's ruling, and they make no attempt to apply the substantial evidence test. As a result, any discussion is moot. But for the sake of completeness, we discuss the issues below.

A. Failure to keep track of the Pineda transaction.

According to the trial court, "the evidence in the administrative record demonstrates that [Diaz and DGI] failed to keep track of Munoz's transactions. [Diaz]

and Munoz testified that during Munoz's tenure at [ANG's] office, Munoz closed only one transaction—the purchase of a single-family residence for a client name Pineda. . . . However, this assertion was contradicted by [Diaz's] July 22, 2009 letter to [the Department], stating that Munoz 'has not close[d] any transactions with our company [DGI].' . . . The failure to initially account for the Pineda transaction to [the Department] demonstrates [Diaz and DGI's] failure to keep track of Munoz's transactions and adequately supervise Munoz."

Diaz and DGI maintain that the July 22, 2009, letter does not support the trial court's finding because it was written in response to the Department's inquiry about ANG's loan modifications, and Diaz only meant to say that Munoz had not conducted any loan modifications on behalf of DGI. The problem with this argument is that Diaz's letter was not couched in limited terms. Rather, without qualification, he indicated that since June 2008, Munoz had not closed any transactions. We decline to read Diaz's letter more narrowly than the trial court did because it's reading is reasonable based on semantics as well as inference. In any event, the finding is supported by evidence that the Pineda file was lost or ruined when Munoz moved, and by the inference that Diaz failed to secure its maintenance.

Next, Diaz points out that he was aware of the transaction because he paid Munoz a commission. But whether Diaz was aware of the transaction at the time does not mean that he kept track of the related documents such that he was able to remember and verify the transaction when the Department made its inquiry.

Beyond the foregoing, Diaz and DGI do not argue that the evidence adverted to by the trial court—if otherwise correct—was so insubstantial that it can be second guessed by a reviewing court. We therefore need not delve deeper. "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

B. The duty of Diaz to inquire further into Munoz's activities.

Diaz and DGI point out that the trial court stated that "[Diaz and DGI] employed Munoz from June 2008 to July 2009[,]" and then opined that their acceptance of Munoz's

claim that there was no activity begged "the question of what Munoz was doing for over a year with almost zero results[,]" and supported the inference that Diaz and DGI were being willfully blind. Though unclear, it appears that Diaz and DGI contend that the trial court assumed without evidence that real estate salespersons perform licensed activities at all times, Diaz should have known this, and he was therefore required to do more than simply meet with Munoz and blindly take his words at face value regarding his lack of licensed activities.

This contention leads Diaz and DGI to state that "it is common knowledge that most real estate salespersons do not do licensed activities on an ongoing basis. Inactivity by a real estate salesperson licensee does not indicate he or she is doing licensed acts and that the salesperson cannot be relied on to disclose his or her licensed activities. The burden the trial court is placing on real estate brokers to supervise real estate salespersons[, which is based on] the . . . [inference] that a broker cannot rely on their salespersons to report licensed activities . . . [,] is unrealistic, and no broker can effectively supervise if he [or she] cannot rely on verbal information provided by a salesperson, especially if there are no documents evidencing licensed activities. The vast majority of real estate salespersons generate their own transactions and then report them to their real estate brokers."

Whether there is support in the record for the trial court's assumption about the general level of activity of real estate salespersons, and about what should seem suspicious to a broker, the point is minor. The undisputed evidence from Granados is that Munoz performed loan modifications and real estate transactions for ANG. In other words, he was more active than he reported to Diaz. And the salient issues are these: What does the law require a broker to do in order to meet his or her obligation to supervise a real estate salesperson, and did Diaz and DGI otherwise satisfy that standard by their conduct? To demonstrate that they complied with the law, Diaz and DGI were required to interpret section 10159.2 and section 2725 of title 10 of the California Code of Regulations in a manner establishing that Diaz's five or six brief meetings with Munoz were sufficient. But Diaz and DGI made no attempt to delineate the nature of their

supervisory duty, which means they have failed to show that the trial court's ruling was erroneous. In light of their silence on the topic, we must presume that the record establishes a failure to properly supervise. This is so because "'[a] judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error[.]'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

C. Munoz's other real estate transactions.

According to Diaz and DGI, "The trial court's [written ruling] . . . finds that Munoz engaged in multiple transactions without the knowledge of [Diaz and DGI]. In the case of Munoz, the record does not indicate other real estate transactions done on behalf of [DGI] with the exception of the cancelled Flores listing transaction. . . . Munoz did not disclose this cancelled listing transaction to [Diaz]. Further, there is no evidence as to what a further inquiry would have disclosed about the Flores transaction, if Munoz stated there [were] no transactions."

The premise of this argument fails. As we have explained, Diaz was responsible for supervising all of Munoz's licensed activities, and all of those activities fell under the umbrella of Diaz's and DGI's broker licenses. It does not matter whether those activities were purportedly performed on behalf of ANG.

Moreover, Diaz and DGI offer no legal analysis. They "apparently assum[e] this court will construct a theory supportive of [their]" appeal, but that "is not our role." (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) "One cannot simply say the court erred, and leave it up to the appellate court to figure out why. [Citation.]" (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) That said, we endeavor to make sense of their statements. Lurking beneath the surface are, inter alia, the contentions that the Flores listing does not support discipline because Munoz never disclosed it, and further inquiry by Diaz would have been fruitless..

In our view, the Flores listing supports discipline insofar as Diaz and DGI did not engage in reasonable supervision of Munoz regarding his listings, whatever that might be. And whether further inquiry by Diaz would have been fruitless is beside the point. If he had reasonably supervised Munoz, there would be no basis for discipline regardless of what that supervision achieved.

VIII. The Discipline.

According to Diaz and DGI, the trial court erred because it failed to independently review the discipline. In addition, they contend the discipline was excessive as a matter of law and therefore cannot stand.

These arguments are misplaced.

A. The propriety of the standard of review employed by the trial court.

In its ruling, the trial court indicated that it reviewed the discipline imposed by the Commissioner for an abuse of discretion. It relied on *Lake v. Civil Service Commission* (1975) 47 Cal.App.3d 224, 228 (*Lake*), which held that the "propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. [Citations.] In reviewing the penalty imposed by an administrative body, which is duly constituted to announce and enforce such penalties, neither a trial court nor an appellate court is free to substitute its own discretion as to the matter nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh. [Citations.] Such interference, in the light of [precedent], will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion by the administrative agency. [Citation.]"

Despite assailing the trial court's standard of review, Diaz and DGI cite no law contradicting or overruling *Lake*. When, as here, "'an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]'" (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

B. Propriety of the discipline.

As set forth in *Lake*, we are bound by the same standard of review as the trial court with respect to the discipline. Thus, we cannot interfere with the discipline meted out unless it was an abuse of discretion.

Diaz and DGI argue that the discipline is excessive because neither of them had a history of disciplinary action; the Commissioner found that they did not solicit or collect advance fees from ANG's customers; they were disciplined based on factual charges not alleged in the Accusation; ANG's advertising and loan modification agreements did not refer to Diaz or DGI; the discipline is barred by section 10179; a broker has no duty to supervise the acts of a salesperson not performed on behalf of the broker; the only transaction involving Munoz cited in the Commissioner's decision was with a person named Flores; administrative hearsay may not be used to support a finding; Munoz did not disclose the uncompleted Flores transaction to Diaz; there are no findings that Munoz did any of the loan modifications alleged in the Accusation on behalf of Diaz and DGI; discipline was imposed based on the activities of ANG even though Diaz and DGI were found not responsible; and Diaz and DGI's knowledge that Munoz worked for ANG is not grounds for discipline because the evidence shows that Diaz and DGI were not involved with the loan modifications.

Diaz and DGI's listing of a host of points, many of which are erroneous, simply does not carry the day. Many of these points have been dispensed with elsewhere in this opinion, and we decline to travel the same ground. Furthermore, as previously explained, we presume a failure to adequately supervise. Also, there is no dispute that Munoz performed loan modifications and real estate transactions for ANG, and that Diaz was not aware of those licensed activities. These facts support the discipline and cut against a finding that the Commissioner abused his discretion.

Diaz and DGI tell us that an abuse of discretion may be found when an agency has imposed the highest allowable penalty which prevents a person from being gainfully employed. Here, not only is there no showing of an abuse of discretion, but Diaz has not

been deprived of the ability to earn a living. The Commissioner's decision permits him to apply for a conditional salesperson license.

Pressing to conclusion, Diaz and DGI suggest that the circumstances surrounding the misconduct and the likelihood of recurrence are relevant factors for us to consider. But then, having identified these factors, Diaz and DGI pass on analyzing them. As a result, we are compelled to take a pass, too.

IX. Waiver of Arguments Not Properly Presented.

California Rules of Court, rule 8.204(a)(1)(B), which provides that appellate briefs must "[s]tate each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority[.]" Due to this rule, and because Diaz and DGI have provided disorganized, interwoven arguments that are repetitive and difficult to pinpoint, we have only considered arguments identified in headings and subheadings. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal. App. 4th 1323, 1345, fn. 17.)

To the degree Diaz and DGI have presented new arguments in headings and subheadings in the reply brief, we consider them waived. (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1755, fn. 1.) That said, it bears memorializing that the reply brief contains a heading arguing that Diaz properly supervised Munoz. Under that heading, they fail to cite or analyze any law regarding the scope of a broker's duty to supervise, and they once again do not apply the substantial evidence test. Rather, they argue the evidence anew, which is improper on appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ